Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 224 of the Act	)	WC Docket No. 07-245
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	

COMMENTS OF SUNESYS, LLC

Respectfully submitted,

SUNESYS, LLC

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SUMMARY

As the Commission recognizes, and as Sunesys has stated on numerous occasions, a timeline for the issuance of pole attachments is both badly needed and completely feasible. By proposing a timeline in the Further Notice, the Commission has taken a much needed step towards ending the lengthy delays in the issuance of pole attachment permits that have plagued broadband deployment for more than a decade. The final step to ending this impediment to broadband deployment is to adopt the proposed timeline in the Further Notice, with some minor changes recommended in these Comments.

The Commission must also ensure (i) that there are no loopholes in its new rules that inadvertently negate, or greatly undermine, the effectiveness of the timeline; and (ii) that independent contractors retained by attachers are permitted to immediately perform the necessary work where utilities' fail to timely do so without allowing utilities to have an opportunity to further delay such work. In addition, where a utility has failed to meet a deadline, an attacher should be permitted to use (i) any of the contractors on a utility's authorized contractor list (which list must include at least three attachers in every locality where a utility owns poles), (ii) any other contractor that the utility uses to work on the poles, or (iii) any other contractor that meets the utility's qualifications, which qualifications cannot exceed those of the utility's own workers in terms of training and must be applied in a non-discriminatory fashion.

When crafting its rules here, the Commission also needs to keep in mind that in this area simple rules will be far more effective than complicated rules. That is, the rules should be as straightforward as possible.

Therefore, for example, the Commission should include a very carefully crafted exception for force majeure that does not inadvertently create a giant loophole that

undercuts the effectiveness of any new rules. In addition, the Commission should refrain from imposing a variety of different timelines depending on the number of attachments, etc. The more complicated the rules are, and the more open to multiple interpretations they are, the less effective they will be.

In these comments, Sunesys also discusses numerous other matters raised in the Further Notice, including that if it is at all practicable, the utility should continue with the necessary work during the pendency of an enforcement proceeding (such as where the dispute regards the proper make-ready charges). Moreover, the recovery in an enforcement proceeding must be substantial enough (and Sunesys offers a recommendation in these Comments regarding this) to further reduce the likelihood that many utilities will continue to ignore their obligations.

Sunesys also believes that the Commission should not increase the amount of permitted penalties for unauthorized attachments at this time given that, among other things, Sunesys suspects that in many instances involving unlawful attachments, parties have performed such attachments because the utility spent a year or more delaying approval of an application. Ironically, allowing greater penalties for unlawful attachments, which would provide a tremendous windfall to the utility involved, would in many instances actually reward those utilities who have acted the most egregiously here.

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COMMENTS OF SUNESYS, LLC

INTRODUCTION

Sunesys, LLC ("Sunesys"),[1] by undersigned counsel, hereby submits the following comments (these "Comments') in the above-captioned matter.[2] As discussed herein, the Commission should promptly adopt a timeline for the issuance of pole attachments consistent with these Comments. The Commission must also ensure (i) that there are no loopholes in its new rules that inadvertently negate, or greatly undermine, the effectiveness of the timeline; and (ii) that independent contractors retained by attachers are permitted to immediately perform the necessary work where utilities' fail to timely do so without allowing utilities to have an opportunity to further delay such work.

One additional recurring theme throughout these Comments is as follows: simple rules will be far more effective than complicated rules – i.e., the rules should be as straightforward and easy to apply, understand, and interpret as possible. Otherwise, some utilities will use the ambiguous or complicated rules to justify further delays based on

[1] Sunesys is a leading provider of non-switched, digital fiber-optic communications networks capable of providing high-speed dedicated access and multiplexing services.

[2] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future, Order and Further Notice of Proposed Rulemaking,* FCC 10-84 (2010) ("Further Notice").

their "interpretation" of those rules. The time for game-playing in this area needs to come to an end. And it can, if the Commission adopts firm, simple, straightforward rules that move this country even further in the right direction with respect to broadband deployment.

The Commission has done a tremendous job on this matter to date, analyzing the issues involved, and releasing a very detailed and thorough Further Notice. It has taken the next-to-last-step in the process of ensuring that pole attachment delays undermining broadband deployment finally come to an end. Sunesys respectfully submits that it is now time to take the last step.

DISCUSSION

I. The Commission Has Taken a Much Needed Step by Proposing a Timeline for the Issuance of Pole Attachment Permits

By proposing a timeline for the issuance of pole attachment permits in the Further Notice, the Commission has taken a much needed step towards ending the lengthy delays in the issuance of pole attachment permits that have plagued broadband deployment for more than a decade. The final step to ending this impediment to broadband deployment is to adopt the proposed timeline in the Further Notice, with some minor changes recommended in these Comments. The Commission should adopt a timeline for the issuance of pole attachments in this proceeding, and issue an order to that effect, as soon as possible.

A timeline for the issuance of pole attachment permits is necessary and long overdue. In proposing a timeline in the Further Notice, the Commission has correctly recognized that the enforcement process alone does not – and cannot - guarantee timely access to poles. The enforcement process, as the Commission acknowledges, involves

considerable time, which leads to even further delays and uncertainty. Moreover, as the Commission also found, the process involves substantial expense, which discourages aggrieved parties from even raising complaints in the first instance and particularly if such parties need to do so on multiple occasions. Utilities know full well that if a provider's anticipated profits from a broadband deployment may be largely or fully offset by attorneys' fees seeking the permits in the first place, the provider will be unlikely to bring a complaint. Providers' time, energy and resources need to be dedicated to providing broadband – not battling utilities in FCC or court proceedings.[3] And as the Commission also recognized, in the enforcement process the remedies are largely prospective, and some issues remain subject to dispute even when formal complaints lead to controlling precedent.

In short, the enforcement process alone cannot be the answer here. The crux of the matter is this: With respect to gaining access to the poles, the rules need to be unambiguous and easy to apply. But where no timeline is in effect, that simply cannot be the case. In fact, without a timeline, providers are at the mercy of utilities who either have no incentive to provide the attachment or a disincentive – and these circumstances greatly undermine broadband deployment, in direct contravention of the Commission's National Broadband Plan.

As the Commission found, the record in this proceeding includes many examples of delay in make-ready work in states without make-ready timelines, in contrast to evidence of more expedited deployment in those states that have adopted timelines, and particularly New York and Connecticut. In fact, the Commission concluded that a

[3] In these Comments, references to utilities are meant to refer to all pole owners, unless otherwise expressly stated.

timeline has the potential to speed pole access more than 50% of the time, and to cut average make-ready time in half (or better) in approximately 30% of the cases.[4]

Indeed, as the Commission recognizes, and as Sunesys has stated on numerous occasions, the undeniable truth is that a timeline for the issuance of pole attachments is both badly needed and completely feasible. As discussed in great detail in many of Sunesys' prior filings in this proceeding, a time limit is necessary because of the following: (i) there is a gaping hole in the current rules, given that there is no time limit in the Commission's rules setting forth the period within which a pole owner has to issue an attachment permit; (ii) timely access to utility poles is critical to the deployment of broadband service – in fact, even utilities admit that providers need access to poles to provide broadband service; (iii) pole owners have no incentive to issue attachment permits, and in many instances they even have incentives to impede such access; (iv) given these realties, many pole owners take advantage of the gaping hole in the rules by causing tremendous delays in the attachment process; (v) pole attachment delays completely derail and/or greatly delay broadband deployment, while also harming competition and unfairly tilting the playing field; and (vi) the interminable delays that undermine broadband deployment will come to an end only if the Commission imposes a time period on the issuance of pole attachment permits.[5]

Moreover, as also discussed in great detail in Sunesys' prior filings, a deadline is certainly feasible given the following (i) several states that regulate pole attachments have already instituted time periods, proving that such deadlines are undeniably feasible;

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[4] Further Notice at ¶ 26.

[5] *See, e.g.,* Comments of Sunesys, GN Docket No. 51 at 5-12 (June 8, 2009); Reply Comments of Sunesys, WC Docket No. 07-245, GN Docket No. 09-51, at 3-14 (July 21, 2009); *see also* Ex Parte Filing of Broadband & Wireless Pole Attachment Coalition, WC Docket No. 07-245 at 5-9 (March 27, 2009).

(ii) some utilities routinely issue attachment permits promptly, further proving that a reasonable time period can be met; and (iii) the Commission's cable franchising order and wireless tower order support adoption of a time limit for the issuance of pole attachment permits as well.[6]

II. The Commission's Proposed Timeline, with a Few Minor Changes, Will Greatly Advance Broadband Deployment and Use

The Commission's proposed timeline in the Further Notice is largely based on the New York law that has been in existence for many years with unquestionable success. Under the Commission's proposal, the timeline would involve five stages: (i) survey; (ii) estimate; (iii) attacher acceptance, (iv) performance; and (v) multiparty coordination. Sunesys recommends that the Commission's timeline include just the first four steps, and that a few modifications to those steps, to the extent set forth in these Comments, should be adopted.

A. The Commission's Proposed Timeline: Timeline for Performing Survey

Under the Commission's proposed timeline, a utility must respond to a request for access within 45 days of receipt of the request, and a request for access is deemed to have been made upon the utility's receipt of a complete application that provides the utility with the information necessary to begin to survey the poles for access. Accordingly, under the Commission's proposal a utility must perform survey and engineering analysis within this 45 day time period in order to determine whether to grant or deny access. If a utility concludes that pole replacement is necessary or that an attachment would be unsafe, it still must respond within 45 days of the request for access.

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[6] Id.

Sunesys recommends a couple of clarifications and a few relatively small modifications to the Commission's proposal with respect to the first step of the process. With respect to clarifications, Sunesys recommends that the Commission expressly require a utility to, within 45 days after receipt of a properly filed pole attachment application, (i) perform survey and engineering analysis to determine whether to accept or reject the request; and (ii) inform the applicant of its decision.[7]

With respect to modifications, Sunesys recommends the following:

(1) If by no later than the 30th day during the period the utility has not yet performed the survey and engineering work, the utility should notify the applicant that it has scheduled such work for a date within the 45 day period (and notified the applicant of such date). If the utility has both failed to perform the work and failed to provide the required notification within such 30 day period, the applicant should be able to immediately use an authorized contractor to perform the survey and engineering work. By including this additional simple notification requirement, applicants will no longer have to wait until after the 45th day to retain a contractor (and therefore have the survey and engineering work performed after the time period contemplated by the Commission) where the utility had no intention of performing the survey and engineering work within the 45 day period.

(2) As for the commencement of the 45 day period, Sunesys recommends that the shot clock begin on the date that a utility receives a properly filed pole attachment application. Sunesys recommends that the Commission find that a pole

[7] It appears that the Commission is imposing these requirements in its proposed rules, *see* Further Notice at 70, but Sunesys simply wants to ensure that they are included.

attachment application shall be deemed properly filed unless within 14 days after receiving the application, a utility (i) notifies the attacher that there are material deficiencies in the application that are within the applicant's control (i.e., such deficiencies cannot be based on information within the utility's control), and (ii) fully identifies the exact nature of such material deficiencies in the notice to the attacher (so that the attacher knows exactly what needs to be done to correct them). This two week period gives the utility sufficient time to ensure the application is complete and devoid of any such material deficiencies. If the application has material deficiencies within the applicant's control and the utility timely notifies the applicant, the application filing date should be the date the utility receives the revised pole attachment application so long as the utility does not notify the attacher of any further material deficiencies in that application within the applicant's control within such two week period.

The Commission should further hold that only deficiencies that prevent a utility from performing the survey and engineering work are material deficiencies. If any application's deficiency is minor in that it does not prevent the utility from performing the survey and engineering work, there is no reason to slow down broadband deployment by restarting the shot clock. Substance over form should reign here.

Accordingly, the shot clock should be stopped and restarted once a new or amended application is filed only where the original application has material deficiencies in the applicant's control of which the utility notifies the attacher within two weeks of receiving the application. In all other instances the shot clock should neither be stopped or restarted due to the form or content of the application. For example, if the utility fails to even review the application for 30 days and then discovers a material deficiency, the

shot clock should not be stopped or restarted because the utility was dilatory in performing its initial review of the application.[8]

B. The Commission's Proposed Timeline: Estimate of Make-Ready Charges

Under the Commission's proposal in the Further Notice, a utility has 14 days after completion of the survey to provide an estimate of the charges for make-ready work. Sunesys agrees with this approach, and believes that, in addition, the Commission's rules should provide that if such estimate is not provided to an attacher within that timeframe, the length of time of any delay will be subtracted from the required time by which the utility must complete the make-ready work. For example, if the utility provides the estimate 24 days after completion of the survey, the time period which it would ordinarily have to perform make-ready work will be reduced by 10 days (e.g., if a utility ordinarily had 45 days to perform make-ready after the attacher pays for the work, the utility would instead have just 35 days). Otherwise, simply by delaying delivery of the estimate for make-ready work, the utility will effectively delay the provision of broadband services by the attacher. The approach recommended herein by Sunesys is not only logical and fair, it is also the approach that has been adopted by the New York Public Service Commission.

C. The Commission's Proposed Timeline: Acceptance of Estimate

Under the Commission's proposal, an attacher has 14 days after receiving the estimate to accept. Sunesys agrees with the Commission's proposal on this issue, but also believes it is important for the Commission to clarify what constitutes acceptance.

[8] Under such scenario, an attacher will, however, need to promptly correct the material deficiency thereafter so that the utility can timely complete the survey and engineering work.

Sunesys recommends that the Commission hold that an attacher shall be deemed to have accepted when it (i) notifies the utility that it has accepted; and (ii) pays to the utility all make-ready costs set forth in the estimate (except that if a portion of those make-ready costs are disputed, the attacher shall be deemed to have accepted if it pays all of the undisputed costs and at least half of the disputed costs (reserving the right to seek a refund as to any overpayment)). Where an attacher disputes some of the costs, the attacher must notify the utility of such dispute, and provide its justification for which such costs are in dispute. Without clarifying precisely what constitutes acceptance, utilities and attachers may find themselves in disputes over that issue.

D. The Commission's Proposed Timeline: Performance of Make-Ready

Under the Commission's proposal, a utility would generally have 45 days after receiving payment to complete make-ready work. Sunesys agrees with providing a utility 45 days to complete the make-ready work once it receives payment, so long as, as discussed in Section II(B) above, the utility timely provided the make-ready estimate. Moreover, Sunesys believes that except where certain extenuating circumstances exist, such as a hurricane (as discussed in greater detail in Section III(C)), utilities should not have more than 45 days to complete the make-ready work once they have received payment.

Sunesys agrees with the Commission that once a utility receives payment, it should immediately notify all existing attachers that those attachers must move, rearrange, or remove any facilities as needed to perform the make-ready work and that, if they fail to timely do so, the utility or its agents, or the new attacher, using authorized contractors, may move or remove any facilities that impede performance of make-ready. Sunesys

believes, however, that the 45 day period the Commission has proposed to provide to existing attachers for making such moves is too long. It simply does not take anywhere near 45 days to move the facilities of existing attachers, all of whom can do it in far less time.

Accordingly, Sunesys recommends that the Commission should allow existing attachers at most 30 days to move or rearrange or remove any facilities needed for the make-ready work. Moreover, the Commission should require the utility to provide a schedule to all existing attachers specifying the dates on which the attachers must take such action (but in no event shall any existing attacher have less than two weeks notice), and then if an existing attacher fails to comply, the utility, its agents, or the new attacher (using an authorized contractor) can perform the work.[9]

If the Commission adopts Sunesys' recommendation set forth above, it will not need to add extra time for multiparty coordination, which may unnecessarily complicate the rules and the enforcement of such rules. Sunesys believes it is simpler to have one rule that applies in virtually every instance so that there is far less confusion, which will result in far fewer disputes and misunderstandings that can undermine broadband deployment.

[9] The Commission raised the issue of existing attachers needing to make modifications because the new attachment might require the pole to come into compliance with a later version of applicable codes. Further Notice at ¶ 54. It is Sunesys' understanding that adding an attachment does not require the pole to come into compliance with later versions of the NESC.

Finally, Sunesys recommends that the timelines adopted by the Commission should apply to not only poles, but also to ducts, conduits and rights-of-way, as delays in access with regard to ducts, conduits and rights-of-way can also delay broadband deployment. [10]

III. There Should Be Very Few Adjustments to the Timeline

A. The Number of Attachments Requested or Size of the Utility Vis a Vis the Number of Attachments Requested Should Not Impact the Timeline

The Commission seeks comment on whether the pole attachment timeline should be dependent on either the number of attachments requested, or the size of the utility vis a vis the number of attachments requested. The short answer is no. Utilities can use contractors if they cannot perform the work themselves. And, given that utilities have at least 105 days between the submission of the application and the issuance of the permit (and 45 days before the survey and engineering work must be done), they should be able to comply with any request by using contractors if necessary. Moreover, it is in the best interest of the Commission, the parties and the public to keep the rules as simple and straightforward as possible to advance broadband deployment and ensure that customer's expectations are met. The more complications there are in the rules, the greater possibility for disputes, which only serves to increase attachers' legal fees and deplete their resources while undermining and delaying broadband deployment.

If the Commission were to decide to nevertheless impose multiple timelines, which Sunesys believes it should not do, it should (i) include only two different timelines (not three or more, which will make matters even more confusing); (ii) base the timeline

[10] Although Sunesys is a wireline provider, Sunesys believes that timelines should also be imposed for wireless attachments. Wireless operators provide invaluable services, and wireless attachments should generally cause no major concerns for utilities.

on the size of the utility vis a vis the number of attachments requested (since larger utilities have an even easier time meeting deadlines given their additional resources); and (iii) ensure the two timelines vary by at most 45 days (so as to discourage disputes).[11]

B. Six Additional Issues Raised by the Commission Relating to Calculating the Timeline or Possible Timeline Adjustments

In the Further Notice, the Commission also seeks comment as to (i) whether small utilities should be able to sort requests, and respond accordingly, depending on whether they are small, medium or large requests, (ii) whether small utilities should have no timelines for all, or at least larger, requests, (iii) whether, during a given period, there should be a cap on the number of attachments an attacher may request from a utility, or a cap as to how many attachments a utility must perform for all attachers; (iv) whether all requests by an attacher within a certain period of time should be considered one request; (v) whether the timelines should be shorter for small requests; and (vi) whether an attacher should have to provide advance notice of significant attachment requests. Here are Sunesys' views on these issues.

- Sorting requests – Sunesys believes all utilities should process and work on requests in the order they receive them. It is unfair to an applicant if its request is "put at the bottom of the pile" because it is a larger request. Moreover, some of the larger requests can have the greatest impact on broadband deployment and certainly should not be discriminated against. In addition, the mere process of labeling requests as "small", "medium" or "large", and then having them processed in a different order

[11] Sunesys believes even this approach is not warranted for the reasons set forth herein and in Section III(B) below. If this Commission nevertheless adopted this approach, each utility would need to post on its website or otherwise make publicly available all information regarding its size.

than they are submitted will only further complicate a process that needs to be streamlined and done quickly.

- Timelines for small utilities – Small utilities must have timelines, just like large utilities. Americans residing in areas served by small utilities have the same needs for broadband as Americans in all other areas. And, as the past dozen years has shown, without timelines the process often breaks down and broadband deployment is undermined. Moreover, small utilities can use contractors to perform the work if they do not have sufficient personnel on hand to conduct the survey and make-ready work. Once again, the fewer complications and variances in the rules, the better (which will also lead to fewer disputes, such as regarding what constitutes a small utility, etc.).

- Cap on numbers of poles requested – There should be no cap for the number of poles requested by an attacher. Sunesys believes that attachers should pay in advance for the work (so they certainly will not ask for more attachments than they need). The Commission should not penalize those entities who are performing large broadband deployments (by capping how many attachments they can ask for). Such an approach would undermine the goals of the Commission and the National Broadband Plan. Similarly, given that utilities can use outside contractors, or permit attachers to do so as well, there certainly is no need to limit the number of overall attachments that a utility must process and perform. If such a cap was created, not only would broadband deployment be undermined, but the rules would be much more difficult to enforce as they would be more complicated, and the information necessary to determine whether an exception applied would be in the hands of the utility, not the attachers.

- Multiple requests from an attacher -- Sunesys believes that if an attacher submits multiple requests to a utility in a given calendar month, for ease of administration the utility could consider those multiple requests as one request, with the application date being deemed to be the application date of the last request submitted during that calendar month.

- Timelines for small requests – Sunesys believes the timelines should be the same for all requests, big or small, to keep the process and the rules as simple as possible. Fewer complications equals fewer misunderstandings and fewer disputes.

- Advance notice of significant attachment requests – Sunesys believes that if the Commission imposed a requirement on attachers to provide advance notice of significant attachment requests, such a rule would add an extra layer of complication and trigger additional disputes (what type of notice, how much notice, what if the attacher did not know until shortly before its request what it would be requesting, if the attacher changes its position and does not go through with the request, does it have any liability to the utility, etc.). However, Sunesys does believe that the Commission in its order should encourage attachers to provide as much advance notice of large attachments as practicable under the circumstances.

C. Extenuating Circumstances or Correcting Prior Violations

The Commission seeks comment on when it should stop the shot clock for extenuating circumstances such as force majeure events. Sunesys recognizes the importance of this issue, but also recognizes that if the rule is ambiguous it will leave a gaping hole that some utilities will exploit, thereby undermining broadband deployment.

Accordingly, Sunesys believes the best approach is for the Commission to hold that (i) extenuating circumstances shall only cause a stoppage of the clock if those same circumstances prevent the utility from otherwise engaging in its routine business operations (and the utility shall as soon as practicable notify the attacher of the delay), and (ii) the shot clock should restart as soon as circumstances permit the utility to re-commence its routine operations. The Commission should also make it clear that it believes absent highly unusual occurrences (e.g., Hurricane Katrina) it would not anticipate that any extenuating circumstances would cause more than a couple of weeks of delay.

The Commission also seeks comment as to whether the shot clock should be suspended or extended where a utility has to correct existing violations on the poles prior to performing any work for the applicant. The answer here is clearly no. A new applicant who has done nothing wrong should not be penalized because a utility's pole is currently in violation of the law. Moreover, it rarely takes significant time to correct such violations in any event, which the utility should proceed with expeditiously given that its poles violate the law.

IV. Utility Proposal for Timelines

Some utilities have requested that the Commission refuse to implement a timeline for many attachments, and instead merely adopt a requirement that utilities perform such work "in a manner that does not discriminate in favor of the utility's own needs or customer's work."[12] This utility proposal is a perfect example of the phrase that "those who don't learn from history are doomed to repeat it." Not only is the utility proposal

[12] Further Notice at ¶ 42.

impossible to enforce in any effective way, the bottom line is this: The industry has gone without a timeline for all of these years, and broadband deployment has suffered as a result. Moreover, this utility proposal adds very little to the current rules that already prohibit discrimination. Years of interminable delays need to end – the utility proposal would simply be more of the same, and under the utility proposal broadband deployment would continue to suffer.

The Commission seeks comment on how the utility proposal balances attachers' interests with pole owners' interests. The answer, of course, is that the utility proposal does not successfully balance such interests. In fact, not only do Sunesys and countless providers recognize that a better balancing of interests is to impose a timeline, even some utilities strongly imply the same. One group of utilities argued that "in Utah, a 120-day make-ready [deadline] may represent a better balance" between the ability of the pole owner to complete the work and the need for it to be finished without undue delay.[13] Another group of utilities pointed to Vermont, which has imposed time limits, as a state that "has established more reasonable deadlines."[14] While the length of the time periods imposed in Utah and Vermont are not necessary (i.e., time periods can be much shorter), what it appears that everyone agrees to either explicitly or implicitly is this: the imposition of time limits for pole attachment permits can be reasonable and feasible. Indeed, given that a number of states have already imposed such time limits, it is highly disingenuous to argue otherwise.

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[13] *Ex Parte Filing of the Edison Electric Institute and the Utilities Telecom Council,* WC Docket. No. 07-245, 8 (April 16, 2009).

[14] *Ex Parte Filing of* Allegheny Power, et. al. WC Docket 07-245, at 8-9 (May 1, 2009).

V. Outside Contractors

A. When Attachers May Use Outside Contractors

The Commission proposes that attachers may use authorized outside contractors to perform surveys and make-ready work if a utility has failed to perform its obligations within the timeline or as otherwise agreed to by the utility. Sunesys completely agrees. Allowing outside contractors to perform the work if a utility misses a deadline is a win, win, win scenario because such rule (i) allows broadband deployment to occur much more quickly because there is no delay waiting for the outcome of an enforcement action; (ii) allows broadband deployment to be less costly because providers are not forced to incur considerable attorneys' fees and deplete other resources to battle the utility; and (iii) preserves the resources of the Commission and courts, which otherwise would be forced to hear such matters.

For survey, make-ready work or post make-ready work, the Commission should require utilities to post on their website or otherwise make publicly available a list of at least three approved contractors operating in each locality where the utility owns poles. An attacher should be permitted to use (i) any of the contractors on such list, (ii) any other contractor that the utility uses to work on the poles, or (iii) any other contractor that meets the utility's qualifications, which qualifications cannot exceed those of the utility's own workers in terms of training and must be applied in a non-discriminatory fashion. As to the latter point, the Commission should require each utility to post on its website or otherwise make publicly available its necessary non-discriminatory qualifications for contractors that are not already on its list or that it does not otherwise use.

All of the above requirements should apply to all utilities, including incumbent LECs. Given that one of the main excuses utilities raise for failing to timely perform

pole attachments is that they do not have the manpower to get the job done, independent contractors are critical to ensuring that pole attachments do not continue to delay and derail broadband deployment.

B. Direction and Supervision of Outside Contractors

The Commission proposes that in most instances utilities and prospective attachers may jointly direct and supervise contractors with respect to survey and make-ready work. Sunesys agrees with this approach as long as it does not result in further delays.

Specifically, for electric utilities and other non-incumbent LEC pole owners, the Commission proposes that the utility may direct and supervise an authorized contractor and should cooperate with the attaching entity in such regard, and that the attacher shall invite representatives of the utility to accompany the contract workers and should mutually agree regarding the amount of notice to the utility. In contrast, with respect to incumbent LEC-owned poles, the Commission proposes that attachers performing surveys and make-ready work using contractors shall invite a representative of the incumbent LEC to accompany and observe the contractor, but the incumbent LEC shall not have final decision-making power.

Sunesys recommends that the Commission's proposal for incumbent LECs apply to all utilities. That is, the attacher or contractor should invite a representative of the utility to accompany the contractor, but the process should not be delayed if the utility cannot attend or fails to respond. Moreover, the Commission should require that a utility receive at least 5 days' notice with respect to the date the work will be performed by the contractor. In addition, where an approved contractor retained by an attacher performs

survey or make-ready work, a utility should only be allowed to charge the attacher its costs to oversee such work if the utility provides an attacher with prior notification (*i.e.*, before the work is performed) that it intends to charge the attacher for such oversight, and of the amount of such charge.[15]

VI. Timing of Payments, Schedule of Charges, Administrative and Other Matters

A. Timing of Payments

The Commission proposes to adopt the rule used in Utah that permits applicants to pay for make-ready work in stages, and to withhold a portion of the payment until the work is complete. In Utah, applicants trigger initiation of performance by paying one half the estimated cost, pay one quarter of the estimated cost midway through performance, and pay the remainder upon completion. Sunesys does not believe that this rule is fair to utilities and Sunesys believes that the best way to advance broadband deployment is to ensure that utilities receive all undisputed make-ready costs in advance, as well as half of any disputed amounts (with attachers having the right to receive a reimbursement for any amounts that are subsequently determined not to have been owed).

B. Schedule of Charges

The Commission proposes that utilities make available to attaching entities a schedule of common make-ready charges. Sunesys recommends that the

[15] In the section of the Further Notice discussing these issues, the Commission also states that electric utilities and other non-incumbent LEC pole owners may exercise final authority to make all judgments that relate directly to insufficient capacity or safety, reliability, and sound engineering, subject to any otherwise-applicable dispute resolution process. Further Notice at ¶ 67. Sunesys believes, as discussed further in Section VIII, that a pole owner's rights should not be so broad as to allow it to unnecessarily undermine broadband deployment.

Commission merely require utilities to (i) ensure that their estimate of make-ready costs provided to an attacher be reasonably and sufficiently detailed to permit an attacher to fully understand all costs involved; and (ii) upon request by an attacher, promptly provide proof of make-ready costs and an itemized cost accounting of such costs. Sunesys believes that attachers do not need a list of schedule of charges, but simply need the above information to help them ensure that they are not overpaying.

C. Administering Pole Attachments

The Commission proposes that, when more than one utility owns a particular pole, the pole owners must determine which of them is the managing utility for any jointly-owned pole, and that requesting attachers need only deal with the managing utility. The Commission further proposes that both pole owners should make publicly available the identity of the managing utility for any given pole. Sunesys fully supports the Commission's position on these matters, and Sunesys believes the Commission should also require that the utilities identify on their websites the managing utility for all jointly-owned poles or otherwise make such information publicly available (i.e., so attachers will know the information even in advance of submitting an application). Without such requirements, attachers face complicated issues with respect to who to deal with, and what to do if the two utilities do not agree on a matter, leading to even further delays and additional costs and headaches for the attacher.

D. Attachment Techniques

With respect to boxing and extension arms, Sunesys believes it is important for utilities to apply their practices in a non-discriminatory manner, and make publicly available (via their websites or otherwise) all decisions they make regarding the

use of boxing and extension arms. This information can be very helpful to prospective attachers.

E. Improving the Availability of Data

The Commission seeks comment on numerous issues relating to the availability of data. Sunesys believes two points are important here. First, a utility should be required to ensure that its pole loading calculation methodology is publicly available, either on its website or otherwise. Second, there should be no additional charges involved in providing such data to attachers. One concern that Sunesys has with the Commission's proposals on this matter is that attachers will have to pay extra charges to receive much more data from the utilities, even though attachers such as Sunesys do not need the extra data (other than the utility's pole loading calculation methodology).

VII. The Enforcement Process and Remedies

A. Specialized Forums

The Commission seeks comment in the Further Notice with respect to whether it should establish specialized forums to handle pole attachment disputes, and, if so, what form and structure the forums should take. The Commission also seeks comment as to whether it should require some attempted resolution at the company level before a formal complaint can be filed, or whether there are other ways that the Commission may encourage that parties seek mediation or arbitration before filing a complaint.

As an initial matter, the Commission will greatly reduce the need for enforcement if it implements the timeline proposed herein, and does not inadvertently permit any loopholes with respect to such timeline that will negate, or materially undermine, the effectiveness of its rules. As to specialized forums, Sunesys believes that the Commission

is the proper place to resolve these matters, and the Commission should adopt the expedited procedures outlined in Section VII (D) below. Sunesys does not believe that parties should be required to seek to resolve matters at the company level before bringing an action, because in some circumstances that may be appropriate, but in others it may just add to the delay.

B. Eliminating the 30 Day Deadline for Filing Complaints

The Commission proposes to eliminate the rule that requires attachers to file a complaint within 30 days of denial of access. Sunesys supports this change. Such a rule discourages efforts to resolve issues amicably without recourse to adversarial proceedings where the attacher believes that such efforts are likely to prove effective. Moreover, it is often unclear under the current rules when the denial of access even occurs since the circumstances frequently involve a utility simply failing to perform make-ready work for exceedingly long periods of time. Under the current ambiguous rules, what month, let alone day, does a utility who fails to act "deny access?" Since the answer to that question is impossible to know, it is difficult to know under the present rules the date by which a complaint must be filed.

C. Remedies in Enforcement Proceedings

As a remedy for an unlawful denial or delay of access, the Commission proposes that it issue an order directing that access be granted within a specified time frame, and/or under specific rates, terms, and conditions. Sunesys agrees with this recommendation. The more certainty involved in the process, the better. If the Commission was not permitted to direct such access and other conditions, a utility could

engage in even more delays after an order, which benefits no one, and certainly not the public.

The Commission also proposes amending its rules to specify that compensatory damages may be awarded where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust or unreasonable. In a similar vein, the Commission proposes that attachers should be permitted to receive damages as far back as the statute of limitations allows (rather than only from the date of the filing of the complaint). Sunesys agrees with these recommendations but Sunesys believes that the Commission needs to go one step further. Attachers who are delayed in their provision of broadband services are often harmed in myriad ways, including the following: harm to their general reputations or their reputation with respect to the particular customer involved (who may refuse to do business with them in the future), the loss of prospective business, and the expenditure of considerable resources in connection with seeking to obtain access from the utility or seeking to determine if there any alternatives to the use of the utility's poles and whether such alternatives (if they even exist) are cost prohibitive (which they usually are). But much of this is not susceptible to precise damage calculations and therefore it is important that the Commission also require that where an attacher prevails in its action against a utility for failure to comply with the deadline in the pole attachment rules, the attacher should receive the greater of (i) compensatory damages; or (ii) liquidated damages equal to 50% of the cost of the make-ready work it was required to pay to the utility or an approved contractor. Such attachers also should be permitted to receive attorneys' fees.

D. Continuing with Make-Ready Work During Pendency of a Dispute and Expedited Response Times

Sunesys recommends that the Commission's rules should also provide that all survey, make-ready or other work shall continue to the extent practicable during a dispute. For example, the rules should provide that where the dispute concerns costs (e.g. make-ready costs), the work shall continue, and the utility shall be responsible for meeting all deadlines, as long as the attacher pays all undisputed amounts owed, and at least half of any disputed amounts invoiced (with overpayments subject to refund). Given the importance of broadband deployment, there is no need to delay such deployment during a dispute that is only about costs or similar types of matters. Sunesys' recommendation here is consistent with the approaches in many states that have mandatory access laws for franchised cable operators wishing to serve multiple dwelling units. Such laws generally provide that no dispute concerning the proper payment amount should delay the provider's right to access the multiple dwelling unit.

Sunesys further recommends that with respect to a pole attachment complaint, if during the pendency of the dispute the attacher has not been issued a pole attachment license by the utility (because the dispute involves whether or how the attachment can be made), the following expedited procedures should apply: a respondent shall have 15 days from the date the complaint was filed within which to file a response, and the complainant shall have 7 days from the date the response was filed within which to file a reply. Sunesys believes such expedited response times are needed given the importance of broadband deployment.

E. Public Notice Concerning the Commission's Resolution of any Pole Attachment Dispute

Sunesys also recommends that the Commission issue a public notice after resolving any pole attachment dispute, which sets forth the operative legal principles that formed the basis for the resolution of that dispute. These public notices are important because many utilities in the past have generally ignored pole attachment decisions and precedent, claiming that every individual case is different. While every case may have different facts, there has been considerable precedent that is applicable to many cases, which some utilities have flatly ignored, such as that a utility cannot charge a new attacher for fixing existing problems on the pole unrelated to the attachment. By providing such public notices, the Commission will help to further amplify and solidify its rules, thereby reducing the number of disputes that will occur.

VIII. Whether Individual Utilities, Due to Purported Safety and Reliability Concerns, Should Have the Right to Impose Extra Conditions or Barriers on Attachers, at Attachers' Expense, that are Not Required by Applicable Laws

The Commission has stated that even though it is proposing a timeline, "[i]ndividual utilities will continue to make pole-by-pole determinations regarding capacity, safety, reliability, and generally applicable engineering purposes."[16] Sunesys believes that the Commission must ensure that the flexibility it seeks to provide utilities on this matter does not inadvertently become a gaping loophole that allows many utilities to act in a manner that derails broadband deployment. State commissions impose rules to ensure that utilities' practices are safe and that their facilities are reliable. Similarly, the NESC is designed to ensure that utilities' practices are safe. Accordingly, if a utility

[16] Further Notice at ¶ 24.

wishes to go above and beyond, and to require that attachers take steps in addition to those required by applicable laws and the NESC in the guise of safety or reliability, such actions should be performed at the utility's cost. Otherwise a utility would be able to impose any standard whatsoever under the guise of safety or reliability, and thereby greatly increase the cost of providing broadband, without any verification that the utility's alleged justifications are correct. Moreover, allowing an individual utility to mandate safety and reliability standards on attachers above and beyond applicable law may in many instances prevent the attachment from occurring, thereby not simply raising the cost of broadband, but denying it all together. In addition, the Commission needs to make it clear that while individual utilities shall have the right to make an initial determination about whether an attachment would violate any laws or the NESC as to safety and reliability, that judgment is subject to review by the public utility commission or a court.

IX. Unauthorized Attachments

The Commission seeks comment in the Further Notice on whether it should permit even greater penalties for unauthorized attachments (current penalties may be as high as pole attachment fees for the number of years since the most recent inventory or five years, whichever is less, plus interest). The Commission also seeks comment on whether it should adopt in whole or in part the approach used by the Oregon Public Utilities Commission (the "Oregon Commission"), and, if not, what approach it should adopt. The Oregon Commission specifies penalties of $500 per pole, per year, for attachment of facilities without an agreement, and, for attachments without a permit, $100 per pole plus five times the current annual rental fee per pole.

Sunesys recommends that the Commission not increase the amount of permissible penalties at this time. With respect to this issue, the Commission should consider the environment which has led to the current conditions. Sunesys suspects that in many instances involving unlawful attachments, parties have performed such attachments because the utility spent a year or more delaying approval of an application, and the attacher believed it had no choice. While Sunesys does not condone such conduct, Sunesys believes the Commission here should not focus on penalizing such attachers for their past misconduct any more than it should focus on penalizing utilities for their past misconduct with respect to ignoring, in some cases for years, attachers' request for access. The goal of the Commission here should be to ensure that all parties' future conduct is lawful and consistent with the Commission's – and this nation's –objectives with respect to broadband deployment. In that vein, the Commission should give attachers a grace period to remove, or commence paying for, all unlawful attachments without penalty.

Moreover, given the likely reason for many unlawful attachments, a substantial number of these attachments are probably located on the poles of utilities who have acted in the most dilatory fashion with respect to allowing pole access. Thus, to allow greater penalties for unlawful attachments, which provides a tremendous windfall to the utility involved, would actually reward in many instances those utilities who have acted the most egregiously here.

If once a shot clock is in place and a grace period to remove any unlawful attachments expires, there continues to be a large number of unlawful attachments, the Commission should revisit the issue then. But now is not the time to penalize those

attachers who may have felt they had no other choice (other than going into another business) and rewarding those utilities who in many instances flouted the law and have undermined broadband deployment.

X. The "Sign and Sue" Rule

The Commission proposes that the "sign and sue" rule should be amended to add a requirement that, with one exception, would mandate that an attacher during contract negotiations provide a utility with written notice of objections to a provision in a proposed pole attachment agreement as a prerequisite for later bringing a complaint challenging that provision. The one exception would be that the attacher is allowed to challenge the lawfulness of a rate, term, or condition in an executed agreement, without prior notice to the utility during contract negotiations, where the attacher establishes the following: that the rate, term, or condition was not unjust and unreasonable on its face, but only as later applied by the utility, and the attacher could not reasonably have anticipated that the utility would apply the challenged rate, term, or condition in such an unjust and unreasonable manner. Sunesys believes that as long as this recommended modification to the "sign and sue" rule is applied only prospectively that may work, except that the exception must apply whenever the disputed language is ambiguous and the attacher interprets it differently from the utility.

CONCLUSION

For all of the foregoing reasons, Sunesys respectfully requests that the Commission adopt rules consistent with these Comments.

Respectfully submitted,

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